UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.545
7 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
Geneva, 12 May-18 July 1997

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

CHAPTER I

INTRODUCTION

1. The International Law Commission held its forty-ninth session at its seat at the United Nations Office at Geneva, from 12 May to 18 July 1997.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)

Mr. Husain Al-Baharna (Bahrain)

Mr. Awn Al-Khasawneh (Jordan)

Mr. Joao Clemente Baena Soares (Brazil)

Mr. Mohamed Bennouna (Morocco)

Mr. Ian Brownlie (United Kingdom)

Mr. Enrique J.A. Candioti (Argentina)

Mr. James Richard Crawford (Australia)

Mr. Christopher John Robert Dugard (South Africa)

Mr. Constantin P. Economides (Greece)

Mr. Nabil Elaraby (Egypt)

Mr. Luigi Ferrari Bravo (Italy)

Mr. Zdzislaw Galicki (Poland)

Mr. Raul I. Goco (Philippines)

Mr. Gerhard Hafner (Austria)

Mr. Qizhi He (China)

Mr. Mauricio Herdocia Sacasa (Nicaragua)

Mr. Jorge E. Illueca (Panama)

Mr. Peter C.R. Kabatsi (Uganda)

Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)

Mr. Mochtar Kusuma-Atmadja (Indonesia)

Mr. Igor Ivanovich Lukashuk (Russian Federation)

Mr. Teodor Viorel Melescanu (Romania)

Mr. Václav Mikulka (Czech Republic)

Mr. Didier Opertti-Badan (Uruguay)

Mr. Guillaume Pambou-Tchivounda (Gabon)

Mr. Alain Pellet (France)

Mr. Pemmaraju Sreenivasa Rao (India)

Mr. Victor Rodriguez Cedeño (Venezuela)

Mr. Robert Rosenstock (United States)

Mr. Bernardo Sepúlveda (Mexico)

Mr. Bruno Simma (Germany)

Mr. Doudou Thiam (Senegal)

Mr. Chusei Yamada (Japan)

B. Officers and the Enlarged Bureau

3. At its 2474th meeting, on 12 May 1997, the Commission elected the following officers:

Chairman:	Mr. A. Pellet
First Vice-Chairman:	Mr. J. Baena Soares
Second Vice-Chairman:	Mr. P. Kabatsi
Chairman of the Drafting Committee:	Mr. P.S. Rao
Rapporteur:	Mr. Z. Galicki

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, previous Chairman of the Commission [1] and the Special Rapporteur. [2]

5. On the recommendation of the Enlarged Bureau, the Commission, at its 2476th meeting, on 14 May 1997, set up a Planning Group composed of the following members: Mr. J. Baena Soares (Chairman), Mr. M. Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. I. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepúlveda, Mr. B. Simma, Mr. D. Thiam and Mr. Z. Galicki (Ex-officio member).

C. Drafting Committee

6. At its 2476th meeting, on 14 May 1997, the Commission established a Drafting Committee composed of the following members: Mr. P. Rao (Chairman), Mr. V. Mikulka (Special Rapporteur), Mr. E. Addo, Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. C. Dugard, Mr. C. Economides, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. P. Kabatsi, Mr. T. Melescanu, Mr. V. Rodriguez Cedeño, Mr. R. Rosenstock, Mr. C. Yamada and Mr. Z. Galicki (Ex-officio member).

7. The Drafting Committee held a total of 20 meetings on the topics of nationality in relation to the succession of States and Reservations to treaties.

D. Working Groups

8. At its 2477th meeting, on 15 May 1997, the Commission established the following Working Groups composed of the members indicated:

(a) State responsibility: Mr. J. Crawford (Chairman), Mr. I. Brownlie, Mr. J. Dugard, Mr. Q. He, Mr. P. Kabatsi, Mr. J. Kateka, Mr. T. Melescanu, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. R. Rosenstock. Mr. B. Simma, Mr. C. Yamada and Mr. Z. Galicki (Ex-officio member).

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[1] Namely Mr. D. Thiam.

[2] Namely Mr. V. Mikulka.

(b) Diplomatic protection: Mr. M. Bennouna (Chairman), Mr. J. Crawford, Mr. N. Elaraby, Mr. R. Goco, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. J. Kateka, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. G. Pambou-Tchivounda, Mr. B. Sepúlveda, Mr. R. Rosenstock, Mr. B. Simma and Mr. Z. Galicki (Ex-officio member).

(c) Unilateral acts of States: Mr. E. Candioti (Chairman), Mr. J. Baena Soares, Mr. J. Dugard, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. N. Elaraby, Mr. G. Hafner, Mr. Q. He, Mr. I. Lukashuk, Mr. V. Rodriquez Cedeño, Mr. B. Sepúlveda and Mr. Z. Galicki (Ex-officio member).

9. At its 2482nd meeting, on 26 May 1997, the Commission established a Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, which was composed of: Mr. C. Yamada (Chairman), Mr. E. Addo, Mr. E. Candioti, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. G. Pambou-Tchivounda, Mr. P. Rao, Mr. B. Simma and Mr. Z. Galicki (Ex-officio member).

10. The Planning Group established, on 26 May 1997, a Working Group on Long-term programmes which was composed of: Mr. I. Lukashuk (Chairman), Mr. J. Baena Soares, Mr. I. Brownlie, Mr. C. Dugard, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. A. Pellet, Mr. B. Simma, Mr. C. Yamada and Mr. Z. Galicki (Ex-officio member).

E. Secretariat

11. At its 2506th meeting, held on 4 July 1997, the Secretary-General of the United Nations, Mr. Kofi Annan, attended the meeting and made a statement on the occasion of celebrating the fiftieth anniversary of the Commission.

12. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Secretary of the Commission; Ms. Christiane Bourloyannis-Vrailas, Mr. George Korontzis and Mr. Mpazi Sinjela, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

13. At its 2474th meeting, on 12 May 1997, the Commission adopted an agenda for its forty-ninth session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. International liability for injurious consquences arising out of acts not prohibited by international law.
4. Reservations to treaties.
5. Nationality in relation to the succession of States.
6. Programme, procedures and working methods of the Commission and its documentation.
7. Cooperation with other bodies.
8. Date and place of the fiftieth session.
9. Other business.

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UNITED
NATIONS

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General Assembly

Distr.
LIMITED

A/CN.4/L.545/Corr.1
17 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
Geneva, 12 May-18 July 1997

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Rapporteur: Mr. Zdzislaw Galicki

CHAPTER I

INTRODUCTION

Corrigendum

B. Officers and the Enlarged Bureau

Paragraph 5, 2nd line: Read: "its 2474th meeting, on 12 May 1997."

C. Drafting Committee

Replace paragraph 6 with the following:

"At its 2476th meeting, on 14 May 1997, the Commission established a Drafting Committee composed of the following members for the topics indicated:

Nationality in relation to the succession of States:

Mr. P. Rao (Chairman), Mr. V. Mikulka (Special Rapporteur), Mr. E. Addo, Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. C. Dugard, Mr. C. Economides, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. P. Kabatsi, Mr. T. Melescanu, Mr. V. Rodriguez Cadeño, Mr. R. Rosenstock, Mr. C. Yamada and Mr. Z. Galicki (Ex-officio member).

Reservations to treaties:

Mr. P. Rao (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. A. Addo, Mr. H. Al-Baharna, Mr. L. Ferrari Bravo, Mr. C. Hafner, Mr. J. Kateka, Mr. R. Rosenstock, Mr. B. Simma, Mr. Z. Galicki (Ex-officio member)."

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General Assembly

Distr.
LIMITED

A/CN.4/L.546
15 July 1997

Original: ENGLISH

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CHAPTER II

Summary of the work of the Commission at its forty-ninth session

GE.97-62982 (E)

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FORTY-NINTH SESSION

13. The Commission adopted on first reading a set of 27 draft articles and a draft preamble, with commentaries, on nationality of natural persons in relation to the succession of States (Chapter IV below), and decided to transmit the draft articles and preamble to Governments for comments and observations.

14. Regarding the topic of Reservations to treaties, the Commission considered the second report of the Special Rapporteur and adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties (Chapter V below).

15. With respect to the topic of State responsibility, the Commission decided to proceed to the second reading of the topic with a view to completing work by the end of the quinquennium (Chapter VI). It also decided on certain procedural and methodological issues. The Commission appointed Mr. J. Crawford Special Rapporteur for the topic, who will submit a report for consideration by the Commission.

16. Concerning the topic of International liability for injurious consequences arising out of acts not prohibited by international law, the Commission decided to proceed first with the work under the sub-title "prevention of transboundary damage from hazardous activities" (Chapter VII below). The Commission appointed Mr. P.S. Rao Special Rapporteur for that part of the topic, who will submit a report thereon.

17. Pursuant to paragraph 13 of General Assembly resolution 51/160, the Commission further examined the scope and content of the topic of diplomatic protection in the light of the comments and observations made by Governments. It decided that the topic was appropriate for consideration and set out a new and more detailed outline on the scope and content of the topic (Chapter VIII). The Commission appointed Mr. M. Bennouna Special Rapporteur for the topic, who will submit a preliminary report at its fiftieth session on the basis of that outline. It is also the Commission's intention to complete the first reading of the topic by the end of the present quinquennium.

18. Pursuant to paragraph 13 of General Assembly resolution 51/160, the Commission further examined the topic of unilateral acts of States. It considered advisable and feasible to initiate work on the codification and progressive development of the applicable legal rules of this topic (Chapter IX, Section I). A new and more detailed outline was prepared. Certain issues pertaining to the scope and content of the subject were clarified. The main objective of the study should, in its view, be to identify the constituent elements and effects of unilateral legal acts of States and to set forth rules which are generally applicable to them, as well as any special rules that might be relevant to particular types or categories of such acts. A plan of work for the quinquennium was also prepared. The Commission appointed Mr. V. Rodriguez Cedeño Special Rapporteur for the topic and, according to the plan, an initial report is to be submitted to the Commission for discussion in 1998.

19. The Commission set up a Planning Group to consider its programme, procedures and working methods. The Commission considered it desirable to complete, as the case may be, the first and the second reading of these topics now before it within the present quinquennium. On the basis of the recommendations made in this regard by the Working Groups on the respective topics, the Commission adopted work programmes to guide its consideration on the relevant subjects (see the respective Chapters below). The Commission recognized the importance of its long-term programme of work and agreed to a general plan in this regard (Chapter X, Section C).

20. Ways to improve the Commission's methods of work were considered. Suggestions were made with respect to: making the debates held at the various stages more efficient; the idea of not fixing a sequence of Chairmanship by geographical region; the election of, or agreement on, the Bureau members at a previous session (see Chapter X, Section A).

21. During the present session, the Commission maintained and initiated relationships with the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee, the Committees of Legal Advisors on Public International Law, and the European Committee on Legal Cooperation (see Chapter X, Section D).

22. A collection of essays by members of the Commission entitled "International Law on the Eve of the Twenty-first Century: views from the International Law Commission" was published as a contribution to the United Nations Decade of International Law (Chapter X, Section G).

23. A training seminar with 22 participants of all different nationalities was held during the Commission (Chapter X, Section H).

24. The Commission agreed that its next session be held at the United Nations Office at Geneva from 20 April to 12 June 1998, and at Headquarters at New York from 27 July to 14 August 1998 (Chapter X, Section A). The Commission will hold a seminar on 21-22 April 1998 to celebrate its fiftieth anniversary.

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CHAPTER III

Specific issues on which comments would be of particular interest to the Commission

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(a) Nationality in relation to the succession of States

(b) Reservations to treaties

(c) State responsibility

(d) International liability for injurious consequences arising out of acts not prohibited by international law

(e) Diplomatic protection

(f) Unilateral Acts of States

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

In response to paragraph 14 of General Assembly resolution 51/160, the Commission identifies the following specific issues for each topic on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work:

(a) Nationality in relation to the succession of States

Comments and observations by Governments would be appreciated on the set of 27 draft articles and a draft preamble on nationality of natural persons in relation to the succession of States, which were provisionally adopted by the Commission on first reading ( ). Governments are also reminded of the request to provide their comments on the practical problems of nationality connected with legal persons in the context of succession of States.

(b) Reservations to treaties

The Commission welcomes comments on the preliminary conclusions adopted on reservations to normative multilateral treaties, including human rights treaties ( ). Monitoring bodies set up by the relevant human rights treaties are also invited to give their comments if they so wish.

(c) State responsibility

The Commission wishes to reiterate its request to Governments for comments and observations on the draft articles adopted at its first reading. Pursuant to General Assembly resolution 51/160, the Secretary-General transmitted in December 1996 a note requesting Governments to submit comments and observations on the subject no later than 1 January 1998. As the Commission will begin the second reading on the draft articles at its next session in April 1998, such comments and observations are essential for the preparation of the Special Rapporteur's report and for the consideration of the Commission.

Comments by Governments on the following issues would be particularly helpful to the Commission:

(i) the treatment of key issues, including "international crimes and international delicts" (Article 19), "countermeasures" (Chapter III), "settlement of disputes" (Part three);

(ii) identification of any areas where more work would be required in the light of the developments since the provisional adoption of the draft article in question;

(iii) identification of any lacuna in the draft articles particularly in light of state practice.

(d) International liability for injurious consequences arising out of acts not prohibited by international law

As the Commission has decided to undertake study under first the title "prevention of transboundary damage from hazardous activities", views by Governments would be very useful to the Commission if they were to comment on:

(i) the approach and content set out in draft articles 4, 6 and 9-19, with commentaries, regarding the principles of prevention and cooperation;

(ii) any other principles or provisions that should be included in this part of the study.

Noting that the Commission has decided to finalize its views on the "international liability" aspect of the topic pending receipt of comments by Governments, the Commission wishes to reiterate its request made in 1996 for comments by Governments, if they have not previously done so, on the issue of international liability in order to assist the Commission on this matter.

(e) Diplomatic protection

Comments by Governments on the proposed outline, and in particular on the following, would greatly assist the Commission:

(a) the scope of the topic as set forth in paragraphs ... to ... of the Report;

(b) who can claim diplomatic protection with respect to whom and against whom;

(c) whether this topic should include protection claimed by international organizations on behalf of their agents;

(d) any other issue which should be included in the proposed outline.

(f) Unilateral Acts of States

The Commission would welcome comments by Governments on, inter alia, the following matters:

(a) the general approach proposed by the working group to deal with this subject;

(b) the scope and content of the study to be undertaken;

(c) the plan of work, and

(d) the final form of the study to be undertaken (whether it should result in a doctrinal study followed by draft articles and commentaries, general conclusions or recommendations, a guideline for the conduct of States, or a combination of these - or other - alternatives).

The Commission would also welcome any background material relevant to the topic which Governments may wish to provide to a Special Rapporteur and the Consultative Group.

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General Assembly

Distr.
LIMITED

A/CN.4/L.548
16 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
Geneva, 12 May-18 July 1997

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CHAPTER VIII

DIPLOMATIC PROTECTION

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(c)	Diplomatic protection concerns indirect injury		
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C.	Future work of the Commission		

GE.97-62994 (E)

Chapter VIII

DIPLOMATIC PROTECTION

A. Introduction

1. Pursuant to paragraph 13 of General Assembly resolution 51/160, the International Law Commission at its 2477th meeting on 15 May established a Working Group [1] to examine further the topic of "Diplomatic Protection" and "to indicate the scope and the content of the [topic] in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit".

2. The Working Group had before it the "General Outline" prepared by the Commission at its forty-eighth session, [2] the topical summary of the discussion held in the Sixth Committee at its fifty-first session, [3] and written comments submitted by Governments. [4]

3. At its 2513th meeting on 15 July, the Commission considered and endorsed the report of the Working Group which is produced below.

B. Report of the Working Group

4. The Working Group is mindful of the customary origins of diplomatic protection whose exercise was characterized by the Permanent Court of International Justice as an "elementary principle of international law" (The Mavrommatis Palestine Concessions). Given the increased exchange of persons and commerce across State lines, claims by States on behalf of their nationals will remain an area of significant interest. The Working Group concluded that the subject of Diplomatic Protection was appropriate for consideration by the Commission.

5. The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the

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[1] Mr. M. Bennouna (Chairman), Mr. I. Brownlie, Mr. J. Crawford, Mr. R. Goco, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. J. Kateka, Mr. Lukashuk, Mr. T. Melescanu, Mr. G. Panbou-Tchivounda, Mr. B. Sepulveda, Mr. R. Rosenstock, Mr. B. Simma and Mr. Z. Galicki (ex-officio).

[2] See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10, (A/51/10), Addendum 1, p. 335.

[3] A/CN.4/479, section E (6).

[4] A/51/358 and Add.1.

context of the topic. The Working Group has not taken a position on various issues raised which require careful study of State practice, jurisprudence and doctrine.

6. The Working Group agreed that the study could follow the traditional pattern of articles and commentaries, but left for future decision the question of its final form. The outcome of the work of the Commission on the subject may, for example, take the form of a convention or guidelines.

7. In the view of the Working Group, the topic is primarily concerned with the basis, conditions, modalities and consequences of diplomatic protection: claims brought by States on behalf of their nationals against another State. A similar mechanism has been extended by analogy to claims by international organizations for the protection of their agents.

8. The Working Group reviewed the "General Outline" of the topic of diplomatic protection contained in the report of the Commission on the work of its forty-eighth session and decided to retain only material dealing with diplomatic protection _stricto sensu_. The scope of the topic will not include damage deriving from direct injury caused by one State to another. In other words it would only address indirect harm (harm caused to natural or legal persons whose case is taken up by a State) and not direct harm (harm caused directly to the State or its property). It concluded therefore that section 3 of that outline (Protection of certain forms of State property, and individuals only incidentally) was not strictly part of the topic.

9. The Working Group also drew attention to the distinction between diplomatic protection properly so called, that is to say a formal claim made by a State in respect of an injury to one of its nationals which has not been redressed through local remedies, and certain diplomatic and consular activities for the assistance and protection of nationals as envisaged by articles 3 and 5 respectively of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

10. The Working Group agreed that the title "Diplomatic Protection" should remain, for it has become a "term of art" in all official languages of the United Nations.

11. The delimitation of the scope of the topic prompted the Working Group to recall a number of principles and distinctions which help to define the

institution of diplomatic protection. Adhering strictly to the content of the topic, the Working Group presents its main aspects as they emerge in international practice.

1. Scope of the topic

(a) Topic confined to secondary rules of international law

12. Just like the topic of State responsibility, the Commission in its study of diplomatic protection should focus on the consequences of an internationally wrongful act (by commission or omission) which has caused an indirect injury to the State usually because of injury to its nationals.

13. Thus the topic will be limited to codification of secondary rules: while addressing the requirement of an internationally wrongful act of the State as a prerequisite, it will not address the specific content of the international legal obligation which has been violated, whether under customary or treaty law.

(b) The nature and definition of diplomatic protection

14. On the basis of nationality of natural or legal persons, States claim, as against other States, the right to espouse their cause and act for their benefit when they have suffered injury and/or a denial of justice in another State. In this respect, diplomatic protection has been defined by the international jurisprudence as a right of the State (see, for example, the Mavrommatis Palestine Concessions case, Series A, No. 2, 30 August 1924, and the Panevezys-Saldutiskis Railway case, Series A/B, No. 76, 28 February 1939).

15. From an historical standpoint, it is the link of nationality which provides the basis of a right of protection by the State, although in some cases, by means of an international agreement, a State may be invested with the right to represent another State and act for the benefit of its nationals.

16. The Hague Convention of 1930 stated as a rule that "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". The question may arise as to whether this rule is still applicable and whether the criterion of effective

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[1] The Working Group noted the difference between the approach to this topic and the first approach adopted in relation to the topic of State responsibility in 1955 where the Special Rapporteur of the topic submitted six reports between 1956 and 1961 dealing, on the whole, with the question of responsibility for injuries to the persons or property of aliens. The emphasis of that topic was on primary rules while diplomatic protection will be confined to secondary rules.

nationality should not also be applied in this case. (Iran-United States case, Series A, No. 18, 6 April 1984). The situation may change in case of protection claimed by international organizations. In the Reparation case, the International Court of Justice stated that the protection claimed by the United Nations is based not upon the nationality of the victim but upon his status as an agent of the organization (I.C.J., Advisory Opinion of 11 July 1949, " Reparation for injuries suffered in the service of the United Nations ", 1949, I.C.J. Reports). Therefore it does not matter whether or not the State to which the claim is addressed regards the victim as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

17. A number of issues require further discussion. One is whether diplomatic protection is based solely on a juricdiction ratione personae over the beneficiary. A related question is whether, even when an individual declines diplomatic protection from its State of nationality, that State may nevertheless exercise diplomatic protection. Another issue is whether diplomatic protection may be exercised at the discretion of a State, or whether there is a right of a national to diplomatic protection. Yet another issue is whether the topic should cover forms of protection other than claims. Finally, the issue of the application of the rules of diplomatic protection in instances of State succession may be considered.

(c) Diplomatic protection concerns indirect injury

18. An injury suffered by a national which is espoused by a State is termed indirect. Such an espousal makes it possible to circumvent the lack of direct access of the nationals to the international sphere. The State then intervenes "to ensure, in the person of its subjects, respect for the rules of international law" (Mavrommatis). When the injury is suffered by an agent of an international organization, the organization may exercise functional protection on his behalf (to protect his rights), without prejudice to the possibility of the national State acting for his benefit by virtue of diplomatic protection (Reparation case).

19. The question also arises as to the type of injury for which an international organization is allowed to exercise protection. In the Reparation case, the International Court of Justice limited the injury for which the organization could demand reparation to one arising from a breach of an obligation designed to help an agent of the organization perform his or her

duties (ibid, p. 182). The Working Group, at this stage, takes no position on whether the topic of "diplomatic protection" should include protection claimed by international organizations for the benefit of their agents. Taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the Working Group agreed that the latter should be studied, at the initial stage of the work on the topic, in order to enable the Commission to make a decision, one way or another, on its inclusion in the topic.

20. The espousal of the claim by the national State gives it some freedom in the determination with the other State on the form of settlement for reparation, which may also include a lump sum for a group of persons.

2. Content of the topic

21. The topic of diplomatic protection deals with at least four major areas: (i) the basis for diplomatic protection, the required linkage between the beneficiary and the States exercising diplomatic protection; (ii) claimants and respondents in diplomatic protection, that is who can claim diplomatic protection against whom; (iii) the conditions under which diplomatic protection may be exercised; and (iv) finally, the consequences of diplomatic protection. The Working Group has identified a number of issues under each of the four main areas for study by the Commission.

Chapter one. Basis for diplomatic protection

A. Natural persons

1. Nationals, continuous nationality
2. Multiple nationals: dominant nationality, genuine link, effective nationality, bona fide nationality
   (a) As against third States
   (b) As against one of the States of nationality
3. Aliens in the service of the State
4. Stateless persons
5. Non-nationals forming a minority in a group of national claimants
6. Non-nationals with long residence in the State espousing diplomatic protection
7. Non-nationals in the framework of international organizations of integration

B. Legal persons

1. Categories of legal persons

(a) Corporations, and other associations in varying forms in different legal systems

(b) Partnerships

2. Insurers

3. Right of espousal in multiple nationality and in special cases (factors: nationality of legal persons, theories of control or nationality of share holders)

C. Other cases (ships, aircrafts, spacecrafts, etc.)

D. Transferability of claims

Chapter two. Parties to diplomatic protection (claimants and respondents in diplomatic protection)

A. States

B. International organizations ("functional" protection)

C. Regional economic integration organizations

D. Other entities

Chapter three. The conditions under which diplomatic protection is exercised

A. Preliminary considerations

1. Presumptive evidence of violation of an international obligation by a State

2. The "clean hands" rule

3. Proof of nationality

4. Exhaustion of local remedies

(a) Scope and meaning

(b) Judicial, administrative and discretionary remedies

(c) Exception to the requirement of exhaustion of local remedies

(i) Demonstrable futility in utilizing local remedies

(ii) Absence of safety for the claimant in the site where local remedies may be exercised

(iii) Espousal of large numbers of similar claims

5. Lis alibi pendens (non-proliferation of the same action in diverse fora)

6. The impact of the availability of alternative international remedies

(a) Right of recourse to human rights bodies

(b) Right of recourse to international tribunals in the field of foreign investment

(c) Other procedural obligations

7. The question of timeliness; effect of delay in the absence of rules on prescription

B. Presentation of an international claim

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E. Effect on settlements of subsequent discovery of mistake, fraud, etc.

C. Future work of the Commission

22. At its 2501st meeting on 11 July, the Commission appointed Mr. M. Bennouna Special Rapporteur for the topic. The Commission recommended that the Special Rapporteur submit, at the next session, a preliminary report on the basis of the outline proposed by the Working Group. The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium.

UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.549
15 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
Geneva, 12 May - 18 July 1997

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

CHAPTER VIII

UNILATERAL ACTS OF STATES

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GE.97-62953 (E)

Chapter VIII

UNILATERAL ACTS OF STATES

A. Introduction

1. In the report on the work of its forty-eighth session, the International Law Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law. 1/

2. The General Assembly, in resolution 51/160, invited the Commission to examine the topic "Unilateral acts of States" and to indicate its scope and content, in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to submit.

3. At its 2477th meeting, on 15 May, the Commission established a Working Group on this topic. 2/

4. At its 2512th meeting, on 14 July, the Commission considered and endorsed the report of the Working Group which is produced below.

B. Report of the Working Group

5. The Group bore in mind the "General outline" for the study of unilateral acts of States submitted by the Commission in annex II, addendum 3, to its report on the forty-eighth session, 3/ as well as the topical summary of the discussion held in the Sixth Committee at the fifty-first session of the General Assembly. 4/

1. Advisability and feasibility of the study

6. The Working Group took the view that consideration by the Commission of "unilateral acts by States", with a view to initiating work on the codification and progressive development of the applicable legal rules, is advisable and feasible, bearing in mind, inter alia, the following reasons:

1/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 230 and pp. 328-329.

2/ Mr. E. Candioti (Chairman), Mr. J. Baena Soares, Mr. J. Dugard, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. N. Elaraby, Mr. G. Hafner, Mr. Q. He, Mr. I. Lukashuk, Mr. V. Rodríguez Cedeño, Mr. R. Rosenstock, Mr. B. Sepúlveda and Mr. Z. Galicki (ex officio).

3/ A/51/10, pp. 343-347.

4/ A/CN.4/479, para. 96.

- In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States;
- State practice in relation to unilateral legal acts is manifested in many forms and circumstances, has been a subject of study in many legal writings and has been touched upon in some judgments of the International Court of Justice and other international courts; there is thus sufficient material for the Commission to analyse and systematize;
- In the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law.

2. Scope and content of the topic

7. In the light of the General Assembly's request in operative paragraph 13 of resolution 51/160, the Working Group concentrated on determining the scope and content of the topic.

(a) Scope

8. The conduct of States in the international sphere is constantly seen in individual initiatives and unilateral actions with many objectives, forms and types of content. This conduct encompasses political, economic, cultural, social, defence, security and other action, in other words, the whole range of activities whereby each State expresses itself and operates in its external relations. The Working Group's first task was, therefore, to endeavour to delimit the subject of study, in other words, to establish what kind of unilateral acts by States should be the subject of attention.

9. The Group bore in mind that, in the "General Scheme", the Commission basically characterized the subject of study as unilateral acts of States that

have consequences relating specifically to the sphere of international law. 5/ This framework is repeated in the General Outline submitted in addendum 3 to the annex. 6/

10. Accordingly, the topic is the unilateral acts of States that are intended to produce legal effects, creating, recognizing, safeguarding or modifying rights, obligations or legal situations. The study should therefore rule out those State activities which do not have such legal consequences. It would also seem appropriate to rule out, at the same time, questions pertaining to the definition and consequences of internationally wrongful acts, inasmuch as they are studied under the heading of international responsibility.

11. The fundamental characteristic of unilateral legal acts is, logically, their unilateral nature. They emanate from one single side (from the Latin "latus"). The Commission does not exclude so-called "collective" or "joint" acts, inasmuch as they are performed by a plurality of States which express, simultaneously or in parallel fashion, as a unitary block, the same willingness to produce certain legal effects without any need for the participation of other subjects or "parties" in the form of acceptance, reciprocity, etc.

12. The reference in the title of the topic to unilateral acts of States also means, in principle, ruling out from the purview of this study unilateral acts carried out by other subjects of international law and, in particular, the very important and varied category of such acts by international organizations. The general scheme in the Commission's report on its long-term programme of work 7/ includes, as other possible topics for future study, under the heading of the law of unilateral acts, the law applicable to resolutions of international organizations and control of their validity. Detailed treatment of unilateral acts of international organizations could thus, in due course, be considered as a possible subject for future work.

13. The Working Group bore in mind that, in the process of treaty formation, amendment, execution, termination, etc., States carry out acts

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5/ A/51/10, Annex II, p. 329.

6/ Ibid., p. 343.

7/ Ibid., p. 329.

which, prima facie, are unilateral in character when viewed in isolation (for example, accession, denunciation, reservation, withdrawal). The Group nonetheless considered that the characteristics and effects of such acts are governed by the law of treaties and do not need to be dealt with further in the context of the new study proposed.

14. Similar arguments were presented in discussing the possible inclusion of unilateral acts carried out by States in the context of international justice. Mention was made in particular of the characterization of acceptance of the optional clause in Article 36, paragraph 2, of the Statute of the International Court of Justice as a unilateral act. The Working Group was inclined to leave this category of acts out of the study taking the view that such acts have a treaty basis.

15. The same position was taken with regard to internal acts (laws, decrees, regulations) that do not have any effect at the international plane. However, internal acts that may have effects on the international plane, such as fixing the extent of the various kinds of maritime jurisdiction (territorial sea, contiguous zone, economic zone, baselines, etc.), should be included to the extent that such unilateral acts create legal situations which are opposable in conformity with international law.

16. The Working Group took account of the important interaction between unilateral acts of States and custom, but preferred not to decide a priori on including or excluding acts which may be elements that could contribute to the formation of customary law. This question will need to be clarified as the study of the topic is taken further.

17. The Group also scrutinized the question of the terms used to denominate the subject of the study and, as a consequence, the necessity or advisability of changing the title of the topic. It considered the various expressions used by writers and in judicial decisions, namely, "unilateral acts", "unilateral declarations", "unilateral engagements", "unilateral obligations", "unilateral legal acts", "unilateral transactions", and so on. Mention was also made of alternatives to omit the adjective "unilateral", because of any extra-juridical connotations. At this time, it was considered that the best course was to move ahead with the substantive definition and basic characterization of the phenomenon to be analysed and to determine its juridical nature and its constituent elements. In this regard, at this

initial stage the expression "unilateral legal acts of States" seems to be the one that points best to what the Commission had in mind in proposing this topic.

18. The positions taken by the Working Group on the issues mentioned in the foregoing paragraphs are of a preliminary nature, since a definitive assessment of the scope of the work to be done can be made only after a detailed analysis of all aspects of the topic.

(b) Content

19. The Working Group considered that the main objective of the study is to identify the constituent elements and effects of unilateral legal acts of States and to set forth rules which are generally applicable to them, as well as any special rules that might be relevant for particular types or categories of such acts.

20. The Working Group was of the opinion that the General Outline proposed in addendum 3 to the Commission's 1996 report constitutes a basis for the study that will have to be improved as work on the topic moves ahead. For the time being, the Working Group has confined itself to redrafting the outline by including a few additions in a second version which is reproduced below, on the understanding that the further development and organization of the topic are to be dealt with in the first report of the Special Rapporteur.

3. Outline for the study of unilateral legal acts of States

Chapter I. Definition of unilateral legal acts of States

Determination of their basic elements and characteristics

(i) Attribution of the act to a State as a subject of international law

(ii) Unilateral nature of the act

(iii) Normative content: expression of will, with intent to produce international legal effects

(iv) Publicity of the expression of will

(v) Binding force recognized by international law

Chapter II. Criteria for classifying unilateral legal acts of States

(i) In terms of their substantive content and their effects

(ii) In terms of the addressee (acts addressed to one, several or all subjects of international law)

(iii) In terms of form (written or oral, explicit or tacit).

Chapter III. Analysis of the forms, the characteristics and the effects of the most frequent unilateral acts in State practice

(i) Unilateral promise or engagement

(ii) Unilateral renunciation

(iii) Recognition

(iv) Protest

(v) Others

Chapter IV. General rules applicable to unilateral legal acts

(a) Forms

(i) Declarations, proclamations and notifications, written or oral

(ii) Conduct

(b) Effects

(i) Binding nature of the unilateral act for the author State

(ii) Creation of rights for other States

(iii) Renunciation of rights of the author State

(iv) Situations of opposability and non-opposability

(c) Applicable rules of interpretation

(d) Conditions of validity

(i) Capacity of State organs or agents to perform unilateral legal acts

(ii) Effects in the international sphere (as opposed to purely internal acts)

(iii) Lawfulness under international law

(iv) Material possible content

(v) Publicity

(vi) Absence of defects in the expression of will

(e) Consequences of the invalidity of an international legal act

(i) Nullity

(ii) Possibility of validation

(f) Duration, amendment and termination

(i) Revocability, limitations on and conditions of the power of revocation and review

(ii) Amendment or termination because of external circumstances
Termination as a result of fundamental change of circumstances
Idem as a result of impossibility of application

Existence of a new peremptory norm

(iii) Effects of a succession of States

Chapter V. Rules applicable to specific categories of unilateral legal acts of States

C. Future work of the Commission

21. The Commission took the view that this new topic should be considered in such a way that the first reading of a draft may be completed within the present quinquennium.

22. To this end, the Commission appointed Mr. V. Rodriguez-Cedeño Special Rapporteur for the topic.

23. The Commission entrusted the Special Rapporteur with the task of preparing a general outline of the topic which would be included in an initial report to be submitted for discussion in 1998 and which would contain:

(a) A brief description of the practice of States, past and present, with examples of the main types of unilateral legal acts that are relevant to the study;

(b) A survey of the consideration of this category of acts by international courts and of the opinions and conclusions of writers who have dealt with the topic; and

(c) A detailed scheme for the substantive development of the topic.

24. The Commission also considered that, in preparing the initial report, the Special Rapporteur would be assisted by a small consultative group of members of the Commission, as the Commission suggested. 8/

25. After discussing the initial report at its fiftieth session, the Commission would submit it for consideration at the fifty-third session of the General Assembly, indicating how the work should continue and stating, inter alia, its views on what the outcome of the work might be: a doctrinal study, draft articles, a set of guidelines or recommendations or a combination of the above.

26. The Commission invites Governments to make their opinions known, both in the Sixth Committee and separately in writing, and provide as soon as possible information they consider relevant for the study of the topic: the importance, usefulness and value each State attaches to its own and others' unilateral legal acts in the international sphere; the practice and experience

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8/ Ibid., para. 194.

of each State in this regard; Government documentation and judicial decisions that should be taken into account; opinion on whether the final result should be a doctrinal report, a list of recommendations or guidelines for the conduct of States or a set of draft articles; the degree of priority or urgency that States attach to this work; commentaries and observations on the scope and content of the study; etc.

27. The Commission expresses the hope that in subsequent reports (in early 1999, early 2000 and, possibly, early 2001), the Special Rapporteur would be able to complete the various chapters and finalize the first full presentation of the study, proposing the corresponding draft articles. This would enable the Commission to complete the first reading and submit its conclusions and recommendations to the fifty-sixth session of the General Assembly.

UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.550
16 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
12 May-18 July 1997

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

CHAPTER X

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

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GE.97-63036 (E)

A. Programme, procedures and working methods of the Commission and its documentation

1. At its 2474th meeting, on 12 May, the Commission established a Planning Group for the current session. 1/ It had before it Section E of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session entitled "General conclusions and recommendations" (A/CN.4/479).

2. At its ... th meeting, held on ..... July, the Commission considered and endorsed the repo t of the Planning Group ( ).

(a) Planning of the current session's work

3. It was noted that, currently, substantive work had already been undertaken on the following topics: Nationality in relation to the succession of States, Reservations to treaties, State responsibility and International liability for injurious consequences arising out of acts not prohibited by international law. According to paragraph 13 of General Assembly resolution 51/160, the Commission was invited further to examine the topics "Diplomatic protection" and "Unilateral acts of States", and to indicate the scope and the content of the topics in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments may wish to submit.

(b) Work programme of the Commission for the quinquennium

4. It was found useful for the Commission to plan its work for the ensuing five years and to prepare a work programme setting out in general terms the goals with respect to each topic concerned to be achieved during the quinquennium. It was, however, noted that such programme should allow sufficient flexibility. The Commission considered that, during the quinquennium, substantial progress should be made on those topics on which substantive work had already been undertaken, and that it would be desirable to complete, as the case may be, the first or the second reading of those topics within the present quinquennium. The Working Groups on the respective topics were thus invited to consider this matter and to make recommendations to that end. These recommendations are included in the respective Chapter on

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1/ The Group was composed of Mr. J. Baena Soares (Chairman), Mr. M. Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. J. Illueca, Mr. J. Kateka, Mr. I. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepúlveda, Mr. B. Simma, Mr. D. Thiam and Mr. Z. Galicki (Ex-officio).

the topic concerned. A year-by-year listing of the plan is produced at the end of Section A.

(c) Methods of Work

5. Various aspects of the current methods of work were commented upon. It was suggested, inter alia, that debates in the Commission on the draft articles during the various stages of consideration (e.g. in the Plenary and the Drafting Committee) should be conducted in such a way so as to avoid repetition and reopening of issues already considered.

6. It was suggested that the currently fixed sequence by geographical region of the rotation system of the Chairmanship should be adjusted so as to provide the flexibility that each region could have an opportunity to assume the Chairmanship at a different year of the quinquennia. There was general support to this suggestion; a way should, however, be found to adjust the practice.

7. To enhance efficient organization of the work of the Commission, it was suggested that the membership (for the following session) of the Bureau or, at least, the Chairman, should be generally agreed upon at the end of a session rather than at the beginning of a session as has been the case.

(d) Split session for 1998

8. The question of a split session for 1998 as an experiment was discussed in the light of the factors outlined in paragraphs 228-233 of the 1996 Report of the Commission.

9. In considering a split session for 1998 as an experiment, it was recognized that the choice of dates was very much circumscribed by such external factors as availability of conference services, the holding of a Diplomatic Conference on the Establishment of an International Criminal Court (between mid-June and July in 1998), and financial constraints under which the United Nations is operating. Due to such difficulties, the only dates available in 1998 were as follows: 20 April to 12 June in Geneva; 27 July to 14 August in New York. There was a preference that the second part of its session should also be held in Geneva; it was, however, noted that the services for summary records would not be available in August in Geneva. The Commission expressed regrets about this lack of flexibility and suggested that the 1998 "experiment" could, therefore, not be made under the best conditions.

10. Recognizing that the 1998 split session would be an experiment and that its value could only be assessed after the session had been held, the Commission considered that appropriate arrangements should, however, be made by the Secretariat so as not to prejudge the outcome of the experiment.

(e) Duration of the Commission's future sessions

11. It was noted that the 10-week session in 1997 was of "an exceptional measure" taken by the Commission having in mind, inter alia, the financial difficulties under which the United Nations was operating in 1997. 2/ Having due regard to the Commission's work programme planner for the quinquennium and complexity of the topics under consideration, the Commission considers that it should have an 11-week session in 1998 and a 12-week session in 1999. The Secretariat was asked to transmit this position to the competent organs concerned.

(f) Celebration of the fiftieth anniversary of the Commission in 1998

12. The Commission took note with appreciation of the General Assembly's decision to organize a colloquium on the progressive development and codification of international law to be held in New York this Autumn. It also noted with appreciation of the offer of the Swiss Government and the Graduate Institute of International Studies (Geneva) to collaborate with the Commission in organizing a seminar in 1998 to celebrate the fiftieth anniversary of the Commission. The Commission decided that the seminar takes place on 22 and 23 April 1998. Members of the Commission were encouraged to submit their suggestions on the themes and formats of the seminar.

13. An informal discussion was held with members of the Graduate Institute. It was suggested that the theme of the seminar should be a critical evaluation of the work of the Commission and lessons learned for the future role of the Commission. Enhancing the Commission's contribution to the progressive development and codification of international law should be the goal of the seminar. A detailed plan should be developed on this basis.

2/ See Official Records of the Fifty-first Session, Supplement No. 10 (A/51/10), para. 250. The session being the first of the quinquennium, which caused a lighter agenda than usual, was also a consideration.

(g) Cooperation with other bodies

14. The Commission took note of the recommendations in this regard contained in the Commission's 1996 report (paragraphs 239-241) and considered useful to take steps to implement those recommendations. During the discussion, reference was made to the Commission's Statute which envisaged that it could conduct a range of relationships with other bodies both within and without the United Nations system. Such relationships include not only dispatching questionnaires and considering "proposals and draft multilateral conventions" submitted to the Commission from the other bodies (Article 17 of the ILC Statute), but also conducting consultations with United Nations organs "on any subject which is within the competence of that organ", and with any other organizations, intergovernmental or otherwise, national or international, on any subject entrusted to it (Articles 25 (1) and 26 (1) of the ILC Statute). It was suggested that consideration should be given to establishing such relationships. It was noted that the establishment of such relationships should be selective, developed on a case-by-case basis, and should not be disproportionate to its principal activities of progressive development in codification of international law.

15. Reference was also made to Article 26 (2) of the ILC Statute by which the Secretary-General was requested to draw up a "list of national and international organizations concerned with questions of international law". The general view was that the list currently used for activities relevant to codification of international law should be reviewed; in-active organizations should be removed; the Asian-African Legal Consultative Committee, the African Society of International Law, the Law Association for Asia and the Pacific, and other similar institutions in the field of public international law should be added to the list. Members were requested to give their comments on the list circulated. A new list should then be prepared for the purpose of distributing documents of the Commission.

Organization of the fiftieth session

16. It was suggested that in principle the first part of the session should be given to the discussion of the various reports on the topics, whereas the second part should be used for the adoption of draft articles with commentaries (with regard to reservations, State responsibility and international liability) and of the report of the Commission. Taking into account the fact that there would not be any summary records in the first week

(20-24 April) except for a first plenary meeting, it was suggested that this first week be given to working groups and to the 2-day seminar for the celebration of the fiftieth anniversary.

Work programme (1998-2001)

1998:

Nationality in relation to the succession of States

Preparation of a questionnaire to be sent to States regarding the question of the nationality of legal persons in relation to the succession of States (to be discussed mainly in a small Working Group on the basis of the report of the Special Rapporteur).

Reservations to treaties

Two reports of the Special Rapporteur: the first report will deal with the definition, the formulation and withdrawal of reservations and the acceptances and objections to reservations. The second report will deal with effects of reservations, acceptances and objections to reservations.

State responsibility

First report of the Special Rapporteur dealing with Part 1, review of the draft articles, (except Article 19: overview of issues relating to State crimes).

International Liability for injurious consequences arising out of acts not prohibited by international law

First report of the Special Rapporteur on "prevention of transboundary damage from hazardous activities".

Request for comments by Governments on "international liability" aspects of the topic.

Diplomatic Protection

First preliminary report of the Special Rapporteur on the basis of an outline proposed by the Working Group.

Unilateral acts of State

First report of the Special Rapporteur. In the preparation of that report, the Special Rapporteur might be assisted by a small consultative group of members of the Commission.

1999:

Nationality in relation to the succession of States

Possible completion of the second reading of the draft articles on nationality of natural persons in relation to the succession of States.

Reservations to treaties

Report of the Special Rapporteur on the status of reservations in the case of succession of States.

State responsibility

Second report of the Report of the Special Rapporteur on draft article 19 and on Part Two (except countermeasures).

International Liability for injurious consequences arising out of acts not prohibited by international law

Possible completion of the first reading of the draft articles on "prevention of transboundary damage from hazardous activities".

[Work on "international liability" part of the topic depending on comments by Governments.]

Diplomatic protection

Second report of the Special Rapporteur.

Unilateral Act of States

Second report of the Special Rapporteur.

2000:

Nationality in relation to the succession of States

Further work depends on comments by Governments regarding nationality of legal persons.

Reservations to treaties

Report of the Special Rapporteur on dispute settlement linked to reservations.

Possible completion of the first reading of the guide to practice in respect of reservations.

State responsibility

Third report of the Special Rapporteur. (Countermeasures and an overview of issues relating to Part Three (settlement of disputes)).

Commission may establish a Working Group on settlement of disputes.

International Liability for injurious consequences arising out of acts not prohibited by international law

Comments by Governments on draft articles on "prevention".

Diplomatic protection

Third report of the Special Rapporteur.

Unilateral Act of States

Third report of the Special Rapporteur.

2001:

State responsibility

Fourth report of the Special Rapporteur (Part Three; any other outstanding issues).

Adoption of draft articles on second reading and commentaries thereto, and of the Commission's resolution on the draft articles.

Reservations to treaties

Completion of first reading of the draft articles.

Diplomatic Protection

Possible completion of the first reading of the topic.

Unilateral acts of States

Possible completion of work on the topic and submission of conclusions and recommendations to the Fifty-sixth session of the General Assembly.

International Liability for injurious consequences arising out of acts not prohibited by international law

Possible completion of second reading of draft articles on "prevention".

B. Appointment of Special Rapporteurs

17. At its 2510th meeting held on 11 July, on the recommendation of the Bureau, the Commission appointed the following as Special Rapporteur for the topic indicated:

State responsibility	Mr. J. Crawford
International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: under the subtitle "prevention of transboundary damage frcm hazardous activities"	Mr. P.S. Rao
Diplomatic protection	Mr. M. Bennouna
Unilateral Act of States	Mr. V. Rodriguez Cedeño

18. It was understood that Mr. P.S. Rao will deal only with the prevention aspects of the topic as set out in the decision of the Commission (see paragraph ...).

19. Before the Special Rapporteurs were appointed, the Chairman referred specifically to the guidelines set out in the Commission's 1996 report regarding the role and functions of Special Rapporteurs: a standing consultative Group (paragraphs 192-195); preparation of commentaries to draft articles (paragraphs 197-200); and the Special Rapporteur's role within the Drafting Committee (paragraphs 201-202).

20. The Special Rapporteurs were called upon to form, as the case may be, their respective consultative Groups and to inform the Secretariat of their compositions.

C. Long-term programmes of work

21. The Planning Group established a Working Group to consider topics which may be taken up by the Commission beyond the present quinquennium. The Working Group on Long-Term Programmes of Work submitted its report (ILC)(XLIX/WG/LTPW.4), which was endorsed by the Planning Group. The Working Group recommended that the selection of topics for the long-term programmes should be guided by the following criteria which were identified by the Group: that the topic should reflect the requirements of States in respect of the progressive development and codification of international law; that the topic is sufficiently advanced in stage in terms of State practice to permit progressive development and codification; that the topic is concrete and feasible for progressive development and codification. In this regard, in the section of new topics, the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. On this basis, the selection of topics would then be made at the Commission's fiftieth session. A process for the selection of topics within the Commission was outlined. 3/ The selected topics will then be presented to the General Assembly at its fifty-third session in 1998 with an indication of how the Commission intends to proceed with the study of each topic. The role of the General Assembly in the selection of topics was stressed.

3/ See document ILC(XLIX)/WG/LTPW/4, paragraph 4.

D. Cooperation with other bodies

22. At its 2490th meeting, held on 13 June 1997, Mr. Zelada Castedo, observer for the Inter-American Juridical Committee (IAJC), informed the Commission of the Committee's current programme of work. The IAJC had prepared a study on the right to information, with particular reference to access to and protection of personal information and data. Work had also been carried out on the development of the most-favoured-nation clauses. Other work involved an inter-American convention to regulate cooperation between American States in combating corruption in public offices. The IAJC was particularly interested in exchanging information with the Commission regarding its past experience in preparing the draft articles on the most-favoured-nation clauses.

23. At its 2491st meeting, held on 30 June 1997, Ms. Marta Requena, Observer for the European Committee on Legal Cooperation (CDCJ) and the Committee of Legal Advisers on Public International Law (CAHDI) informed the Commission of the Committee's work and activities. The CAHDI had given consideration to the law and practice relating to reservations to treaties and that it took account of the International Law Commission's work on the subject - particularly the questionnaire circulated by the Special Rapporteur. The CAHDI was also currently engaged in the collection and dissemination of documents concerning State practice with respect to State succession and the question of recognition, focusing on the period 1989-1994. A Multidisciplinary Group on Corruption had drawn up a Programme of Action against Corruption and considered in 1996 a preliminary draft framework convention on the subject.

24. At its 2494th meeting, held on 23 June 1997, Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee (AALCC) informed the Commission that the AALCC planned to convene in 1998, a special meeting on reservations to the law of treaties. The AALCC had considered various topics on the Commission's agenda including the framework convention on the law of non-navigational uses of international watercourses and the question of the establishment of an international criminal court. The AALCC had also drawn its members' attention to the Commission's draft articles on the draft Code of Crimes against the peace and security of mankind. In addition, the AALCC had considered a new item, namely, the extraterritorial application of national laws: sanctions imposed against third parties.

25. At its 2503rd meeting, held on 2 July 1997, Judge Jiuyong Shi, representing Judge Steven Schwebel, President of the International Court of Justice, informed the Commission of the Court's recent activities and of the cases currently before its docket. Judge Shi paid tribute to the significant contributions made by the Commission. It was noted that the draft articles and reports prepared by the Commission were treated by the Court as sources which were treated at least as authoritative as writings of the most eminent publicist of international law. In its decisions, the Court often referred to the draft articles formulated by the Commission and to the commentaries to the draft articles, sometimes even to the reports and summary records of the Commission. An exchange of views followed. To establish a dialogue with the Court was considered very useful for the Commission. This initiative should be continued.

26. On 9 July an informal exchange of views on various aspects of international humanitarian law was held between members of the Commission, members of the Secretariat of the International Committee of the Red Cross, and the representative of the International Federation of Red Cross and Red Crescent Societies.

E. Date and place of the fiftieth session

27. On the basis of those external factors mentioned above, the Commission agreed that its next session be held at the United Nations Office at Geneva from 20 April to 12 June 1998 and at the United Nations Headquarters at New York from 27 July to 14 August 1998 (see Section A (d) above).

F. Representation at the fifty-third session of the General Assembly

28. The Commission decided that it should be represented at the fifty-third session of the General Assembly by its Chairman, Mr. Alain Pellet. 4/

G. Contribution to the Decade of International Law

29. Pursuant to its decision, the Commission published in April 1997 a collection of essays by members of the Commission, entitled "International Law on the Eve of the Twenty-first Century: Views from the International Law Commission". This publication was intended as a contribution to the

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4/ At its 2513rd meeting, held on 15 July, the Commission requested Mr. V. Mikulka, Special Rapporteur on Nationality in Relation to the Succession of States to attend the fifty-third session of the General Assembly under the terms of General Assembly resolution 35/44.

United Nations Decade of International Law (1989-1999). This publication also coincided with the fiftieth anniversary of the Commission. The collection contains 20 essays, either in English or French, by members or the Commission, an introduction on the achievement of the International Law Commission by the Secretariat, a preface by the Secretary-General and a foreword by Mr. A. Pellet, Chairman of the Commission's Working Group on its contribution to the United Nations Decade of International Law.

H. International Law Seminar

30. Pursuant to General Assembly resolution 51/160 the thirty-third session of the International Law Seminar was held at the Palais des Nations from 16 June to 4 July 1997, during the forty-ninth session of the Commission. The Seminar is for advanced students specializing in international law and for young professors or government officials intended for an academic or diplomatic career or posts in the civil service in their country.

31. Twenty-two participants of different nationalities, mostly from developing countries, took part in the session. 5/ The participants in the Seminar attended meetings of the Commission and heard specially arranged lectures.

32. The Seminar was opened by the Commission's Second Vice-Chairman, Mr. Peter Kabatsi. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration and organization of the Seminar.

33. The following lectures were given by members of the Commission:

5/ The following persons participated in the thirty-third session of the International Law Seminar: Mr. Ephraim Aberra Jimma (Ethiopia); Ms. Roselyne Allemand (France); Mr. Alfonso Ascencio-Herrera (Mexico); Mr. Bayarmunkh Chuluuny (Mongolia); Ms. Viviane Contin-Williams (Argentina); Mr. Carlos Diaz (Costa Rica); Ms. Kadiatou Doukouré (Guinea); Mr. Christophe Eick (Germany); Mr. Murad Karriyev (Turkmenistan); Ms. Ketrah Katunguka (Uganda); Ms. Dinara Kemelova (Kyrgyzstan); Mr. Konstantinos Magliveras (Greece); Ms. Sari Mäkelä (Finland); Mr. Bugalo Maripe (Botswana); Ms. Yolanda Membreño (Honduras); Mr. Blé Simplice Polri (Côte d'Ivoire); Ms. Jani Purnawanty (Indonesia); Ms. Alejandra Quezada Apablaza (Chile); Mr. Hugo Ruiz Diaz Balbuena (Paraguay); Ms. Nazee Shahzadi (Pakistan); Mr. Shaplee Rohimi (Malaysia) and Mr. Xiaodong Yang (China). Due to unforeseen circumstances, two additional selected candidates from Bangladesh and Liberia were unable to attend. A Selection Committee, under the Chairmanship of Professor Nguyen-Huu Tru (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 11 April 1997 and, after considering some 110 applications for participation in the Seminar, selected 24 of the candidates.

Mr. Alain Pellet: "The work of the International Law Commission"; Mr. Raul Goco: "International law implications on the recovery of ill-received funds"; Mr. Vaclav Mikulka: "State succession and its impact on the nationality of natural and legal persons"; Messrs. Gerhard Hafner and Victor Rodriguez Cedeño: "The establishment of the International Criminal Court"; Mr. Robert Rosenstock: "The law of the non-navigational uses of international watercourses"; Mr. Ian Brownlie: "Dispute settlement"; Mr. Enrique Candioti: "Unilateral acts of States"; and Mr. Bruno Simma: "International law and human rights in the work of the United Nations".

34. Lectures were also given by Mr. Roy S. Lee, Director, Codification Division, Office of Legal Affairs and Secretary to the International Law Commission: "The process of international law making"; Ms. Erika Feller, Deputy-Director, Division of International Protection, United Nations High Commissioner for Refugees: "The protection mandate of UNHCR"; Mr. William Davey, Director, Legal Affairs Division, World Trade Organization: "The WTO machinery for trade dispute settlement"; and Ms. Claude Roberge, Advocate, Legal Division, International Committee of the Red Cross: "The ICRC and international penal repression of violations of international humanitarian law".

35. Participants were also given the opportunity to make use of the facilities of the United Nations Library and of the UNHCR Visitors' Centre, to view training videos on international law, and to visit the Museum of the ICRC.

36. The Republic and Canton of Geneva offered its traditional hospitality to the participants after a guided visit of the Alabama and Grand Council Rooms.

37. Mr. Alain Pellet, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Ms. Kadiatou Doukouré, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar, which coincided with the visit of the Secretary-General of the United Nations to the Commission. On this occasion, participants engaged in a dialogue with the Commission on its work. Each participant was presented with a certificate attesting to his or her participation in the thirty-third session of the Seminar.

38. The Commission noted with particular appreciation that the Governments of Cyprus, Denmark, Finland, Germany, Iceland, Norway and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International

Law Seminar. Thanks to those contributions, it was possible to award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 18 candidates and partial fellowship (subsistence only) to 1 candidate.

39. Of the 736 participants, representing 142 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 387 have received a fellowship.

40. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 1998 with as broad a participation as possible.

41. The Commission noted with satisfaction that in 1997 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, despite existing financial constraints.

UNITED
NATIONS

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General Assembly

Distr.
LIMITED

A/CN.4/L.551
16 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
Geneva, 12 May-18 July 1997

REPORT OF THE PLANNING GROUP

Programme, procedures and working methods of the Commission and its documentation

1. At its 2474th meeting, on 12 May, the Commission established a Planning Group for the current session. 1/ It had before it Section E of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session entitled "General conclusions and recommendations" (A/CN.4/479).

2. The Planning Group adopted its report on 15 July 1997.

Planning of the current session's work

3. It was noted that, currently, substantive work had already been undertaken on the following topics: nationality in relation to the succession of States, reservations to treaties, State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. According to paragraph 13 of General Assembly resolution 51/160, the Commission was invited further to examine the topics "Diplomatic protection" and "Unilateral acts of States", and to indicate the scope and the content of the topics in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments may wish to submit.

1/ The Group was composed of Mr. J. Baena Soares (Chairman), Mr. M. Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. J. Illueca, Mr. J. Kateka, Mr. I. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepúlveda, Mr. B. Simma, Mr. D. Thiam and Mr. Z. Galicki (ex-officio).

4. At its first meeting, the Group recommended that the Commission should endeavour to complete its first reading of the draft articles on the topic "Nationality in relation to the succession of States" at its present session.

5. At its first meeting, the Planning Group considered also desirable that work plans and detailed outlines be prepared by the respective working group on the topic of diplomatic protection and of unilateral acts of States.

Work programme of the Commission for the quinquennium

6. The Planning Group found it useful for the Commission to plan its work for the ensuing five years and to prepare a work programme setting out in general terms the goals with respect to each topic concerned to be achieved during the quinquennium. It was, however, noted that such programme should allow sufficient flexibility. The Planning Group considered that, during the quinquennium, substantial progress should be made on those topics on which substantive work had already been undertaken, and that it would be desirable to complete, as the case may be, the first or the second reading of those topics within the present quinquennium. The Working Groups on the respective topics were thus invited to consider this matter and to make recommendations for the consideration of the Planning Group. The Planning Group endorsed their recommendations which are reproduced in the respective Chapter on the topic concerned. A year-by-year listing of the plan is attached (see Annex).

Methods of work

7. Various aspects of the current methods of work were commented upon. It was suggested, inter alia, that debates in the Commission on the draft articles during the various stages of consideration (e.g. in the Plenary and the Drafting Committee) should be conducted in such a way so as to avoid repetition and re-opening of issues already considered.

8. It was suggested that the currently fixed sequence by geographical region of the rotation system of the chairmanship should be adjusted so as to provide the flexibility that each region could have an opportunity to assume the chairmanship at a different year of the quinquennia. There was general support to this suggestion; a way should, however, be found to adjust the practice.

9. To enhance efficient organization of the work of the Commission, it was suggested that the membership (for the following session) of the Bureau or, at least, the Chairman, should be generally agreed upon at the end of a session rather than at the beginning of a session as has been the case.

Split session for 1998

10. The Planning Group discussed the question of a split session for 1998 as an experiment in the light of the factors outlined in paragraphs 228-233 of the 1996 Report of the Commission.

11. In considering a split session for 1998 as an experiment, it was recognized that the choice of dates was very much circumscribed by such external factors as availability of conference services, the holding of a

Diplomatic Conference on the Establishment of an International Criminal Court (between mid-June and July in 1998), and financial constraints under which the United Nations is operating. Due to such difficulties, the only dates available in 1998 were as follows: 20 April to 12 June in Geneva; 27 July to 14 August in New York. There was a preference that the second part of its session should also be held in Geneva; it was, however, noted that the services for summary records would not be available in August in Geneva. The Group expressed regrets about this lack of flexibility and suggested that the 1998 "experiment" could, therefore, not be made under the best conditions.

12. Recognizing that the 1998 split session would be an experiment and that its value could only be assessed after the session had been held, the Group considered that appropriate arrangements should, however, be made by the Secretariat so as not to prejudge the outcome of the experiment.

Duration of the Commission's future sessions

13. The Planning Group considered also the length of its future sessions. It was noted that the 10-week session in 1997 was of "an exceptional measure" taken by the Commission having in mind, inter alia, the financial difficulties under which the United Nations was operating in 1997. 2/ Having due regard to the Commission's work programme planner for the quinquennium and complexity of the topics under consideration, the Planning Group recommends that the Commission should have an 11-week session in 1998 and a 12-week session in 1999. The Secretariat was asked to transmit this position to the competent organs concerned.

Long-term programme of work: programme beyond the current quinquennium

14. The Planning Group established a Working Group to consider topics which may be taken up by the Commission beyond the present quinquennium. The Working Group on Long-Term Programmes of Work submitted its report (ILC(XLIX)/WG/LTPW/4), which was endorsed by the Planning Group. The Working Group recommended that the selection of topics for the long-term programmes should be guided by the following criteria which were identified by the Group: that the topic should reflect the requirements of States in respect of the progressive development and codification of international law; that the topic is sufficiently advanced in stage in terms of State practice to permit progressive development and codification; that the topic is concrete and feasible for progressive development and codification. In this regard, in the selection of new topics, the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. On this basis, the selection of topics would then be made at the Commission's fiftieth session. A process for the selection of topics within the Commission was outlined. 3/ The selected topics will then be presented to the General Assembly at its fifty-third session in 1998 with

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2/ See Official Records of the Fifty-first Session, Supplement No. 10 (A/51/10), para. 250. The session being the first of the quinquennium, which caused a lighter agenda than usual, was also a consideration.

3/ See document ILC(XLIX)/WG/LTPW/4.

an indication of how the Commission intends to proceed with the study of each topic. The role of the General Assembly in the selection of topics was stressed.

Celebration of the fiftieth anniversary of the Commission in 1998

15. The Planning Group took note with appreciation of the General Assembly's decision to organize a colloquium on the progressive development and codification of international law to be held in New York this autumn. The Group also noted with appreciation the offer of the Swiss Government and the Graduate Institute of International Studies (Geneva) to collaborate with the Commission in organizing a seminar in 1998 to celebrate the fiftieth anniversary of the Commission. The Group recommends that the seminar takes place on 22 and 23 April 1998. Members of the Commission were encouraged to submit their suggestions on the themes and formats of the seminar. An informal discussion was held with members of the Graduate Institute. It was suggested that the theme of the seminar should be: critical evaluation of the work of the Commission and lessons learned for the future role of the Commission. Enhancing the Commission's contribution to the progressive development and codification of international law should be the goal of the seminar. A detailed plan should be developed on this basis.

Cooperation with other bodies

16. The Planning Group took note of the recommendations in this regard contained in the Commission's 1996 report (paras. 239-241) and considered useful to take steps to implement those recommendations. During the discussion, reference was made to the Commission's Statute which envisaged that it could conduct a range of relationships with other bodies both within and without the United Nations system. Such relationships include not only dispatching questionnaires and considering "proposals and draft multilateral conventions" submitted to the Commission from the other bodies (Art. 17 of the ILC Statute), but also conducting consultations with United Nations organs "on any subject which is within the competence of that organ", and with any other organizations, intergovernmental or otherwise, national or international, on any subject entrusted to it (Arts. 25 (1) and 26 (1) of the ILC Statute). It was suggested that consideration should be given to establishing such relationships. It was noted that the establishment of such relationships should be selective, developed on a case-by-case basis, and should not be disproportionate to its principal activities of progressive development in codification of international law.

17. Reference was also made to Article 26 (2) of the ILC Statute by which the Secretary-General was requested to draw up a "list of national and international organizations concerned with questions of international law". The general view was that the list currently used for activities relevant to codification of international law should be reviewed; inactive organizations should be removed; institutions in the field of public international law: the Asian-African Legal Consultative Committee, the African Society of International Law, the Law Association for Asia and the Pacific, and other similar institutions in that field should be added to the list. Members were requested to give their comments on the list circulated. A new list should then be prepared for the purpose of distributing documents of the Commission.

Organization of the fiftieth session

18. It was suggested that, in principle, the first part of the session should be given to the discussion of the various reports (reservations, State responsibility, international liability, diplomatic protection, unilateral acts), whereas the second part should be used for the adoption of draft articles with commentaries (with regard to reservations, State responsibility and international liability) and of the report of the Commission. Taking into account the fact that there would not be any summary records in the first week (20-24 April) except for a first plenary meeting, the Planning Group suggested that this first week be given to working groups and to the two-day seminar for the celebration of the fiftieth anniversary.

Annex

Work programme (1998-2001)

1998:

Nationality in relation to the succession of States

Preparation of a questionnaire to be sent to States regarding the question of the nationality of legal persons in relation to the succession of States (to be discussed mainly in a small Working Group on the basis of the report of the Special Rapporteur).

Reservations to treaties

Two reports of the Special Rapporteur: the first report will deal with the definition, the formulation and withdrawal of reservations and the acceptances and objections to reservations. The second reeport will deal with effects of reservations, acceptances and objections to reservations.

State responsibility

First report of the Special Rapporteur dealing with Part One, review of the draft articles, (except Article 19: overview of issues relating to State crimes).

International Liability for injurious consequences arising out of acts not prohibited by international law

First report of the Special Rapporteur on "prevention of transboundary damage from hazardous activities".

Request for comments by Governments on "international liability" aspects of the topic.

Diplomatic Protection

First preliminary report of the Special Rapporteur on the basis of an outline proposed by the Working Group.

Unilateral acts of State

First report of the Special Rapporteur. In the preparation of that report, the Special Rapporteur might be assisted by a small consultative group of members of the Commission.

1999:

Nationality in relation to the succession of States

Possible completion of the second reading of the draft articles on nationality of natural persons in relation to the succession of States.

Reservations to treaties

Report of the Special Rapporteur on the status of reservations in the case of succession of States.

State responsibility

Second report of the Report of the Special Rapporteur on draft article 19 and on Part Two (except countermeasures).

International liability for injurious consequences arising out of acts not prohibited by international law

Possible completion of the first reading of the draft articles on "prevention of transboundary damage from hazardous activities".
[Work on "international liability" part of the topic depending on comments by Governments.]

Diplomatic protection

Second report of the Special Rapporteur.

Unilateral Act of States

Second report of the Special Rapporteur.

2000:

Nationality in relation to the succession of States

Further work depends on comments by Governments regarding nationality of legal persons.

Reservations to treaties

Report of the Special Rapporteur on dispute settlement linked to reservations.

Possible completion of the first reading of the guide to practice in respect of reservations.

State responsibility

Third report of the Special Rapporteur. (Countermeasures and an overview of issues relating to Part Three (settlement of disputes)).

Commission may establish a Working Group on settlement of disputes.

International Liability for injurious consequences arising out of acts not prohibited by international law

Comments by Governments on draft articles on "prevention".

Diplomatic protection

Third report of the Special Rapporteur.

Unilateral Act of States

Third report of the Special Rapporteur.

2001:

State responsibility

Fourth report of the Special Rapporteur (Part Three: any other outstanding issues).

Adoption of draft articles on second reading and commentaries thereto, and of the Commission's resolution on the draft articles.

Reservations to treaties

Completion of first reading of the draft articles.

Diplomatic Protection

Possible completion of the first reading of the topic.

Unilateral acts of States

Possible completion of work on the topic and submission of conclusions and recommendations to the Fifty-sixth session of the General Assembly.

International Liability for injurious consequences arising out of acts not prohibited by international law

Possible completion of second reading of draft articles on "prevention".